

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 96-351 WDK Dated: May 14, 2008
Title: William Kirkpatrick -v- Robert Ayers, Warden

PRESENT: HONORABLE WILLIAM D. KELLER, SR. U.S. DISTRICT JUDGE

Patricia Gomez Not Present
Courtroom Deputy Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: ATTORNEYS PRESENT FOR DEFENDANTS:

N/A N/A

PROCEEDINGS: Order to Show Cause (IN CHAMBERS)

The Court has received the parties' Joint Statement and Proposed Litigation schedule. The Court has separately issued the proposed Order denying Petitioner's request to waive his remaining federal habeas claims, but does not endorse the parties' proposal for a seven-month delay in this case for further proceedings regarding Petitioner's competency to assist counsel.

As noted in this Court's Order of July 17, 2006, Petitioner's competency was established in a state court proceeding in November 2001. This Court, learning that Petitioner was subsequently placed into San Quentin's mental health program, erroneously allowed reopening of the issue. As set forth in the Order, the placement was an administrative matter, and there was no evidence of degradation of Petitioner's mental health. Absent some evidence of a loss of competency, the state court's determination deserves deference.

A determination of competency is not eternal, but to reopen the issue "sufficient evidence must be presented to cause the Court to conduct an inquiry," *Mason v. Vasquez*, 5 F.3d 1220, 1224 (9th Cir. 1993). The Court has reviewed the recent videorecording of Petitioner as part of his decision to refuse to meet with Dr. Maloney, and found him in those brief recordings to be composed, oriented, and focused. If Petitioner's counsel now wishes to revisit this issue, they must present the Court with the factual basis upon which they will argue that there is reason to doubt his competency. The Court reviewed the contents of Petitioner's writings and considered the opinion of Petitioner's expert, Dr. Xavier Amador, as part of the July 17, 2006, Order, and found those things insufficient. Counsel must have a new factual basis for a renewed motion.

The Court is concerned about the extensive delays in this case, particularly after the two-year detour just taken. If Petitioner wishes to once again claim incompetence and move under *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), he must file his motion by **May 30, 2008**, or else he must **show cause** by that date that substantial reason exists to be concerned that Petitioner's mental health has declined since this Court's Order of July 17, 2006, and that a longer briefing schedule is necessary. This showing must be supported by competent evidence both that petitioner's competence is now at issue and that more time is required to fully brief the issues. The Court will not accept an argument based upon the premise that Petitioner must first be evaluated by a mental health professional to see if his mental state has declined. Counsel must be prepared to move based upon the facts that now exist, and may not indefinitely delay progress in this case based upon what he hopes to find.

Counsel for Respondent is ordered to file his updated Motion to Dismiss with this Court on or before **May 30, 2008**. The Court will set the dates for Petitioner's opposition brief and Respondent's reply brief as part of the Order ruling upon Petitioner's *ex rel. Gates* submission. Should Petitioner's counsel choose to not file the motion or show cause, his opposition shall be due June 16, 2008, and Respondent's reply shall be due June 23, 2008. The Court will notify the parties if oral argument will be required on the motion.

IT IS SO ORDERED.

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